NO. 85253-2
(Court of Appeals No. 63040-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

MANSOUR HEIDARI,

Petitioner.

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER.

The State of Washington asks this Court to accept review of the decision designated in Part B of this motion pursuant to RAP 13.5A(a)(1).

B. DECISION.

By published decision filed January 24, 2011, Division I of the Court of Appeals granted Mansour Heidari's personal restraint petition and remanded the matter to vacate his conviction for child molestation in the second degree. The Court of Appeals rejected the State's argument that the appropriate remedy was to remand for entry of judgment on the lesser included offense of attempted child molestation in the second degree. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW.

1. Whether review should be granted where the Court of Appeals decision conflicts with decisions of this Court and other Court of Appeals decisions.

2. Whether review should be granted where the Court of Appeals decision mistakenly relied on dicta from this Court's

decision in State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

3. Where insufficient evidence supports the conviction for child molestation in the second degree, may the appellate court direct entry of judgment for the lesser offense of attempted child molestation in the second degree based on the fact that the jury necessarily found all the elements of that crime.

D. STATEMENT OF THE CASE.

The petitioner, Mansour Heidari, was charged with five acts of sexual abuse against his niece. Counts I and III charged the defendant with rape of a child in the first degree, Counts II and IV charged him with child molestation in the first degree, and Count V charged him with child molestation in the third degree.

The victim of these crimes, B.Z., was born on March 29, 1986. 3RP 324.[1] B.Z.'s family immigrated to the United States from Iran when she was four years old. 3RP 325. In addition to her

[1] The Verbatim Report of Proceedings from the trial will be referenced herein as follows: 1RP refers to October 3 and 7, 2002; 2RP refers to October 8, 2002; 3RP refers to October 9 and 10, 2002; 4RP refers to October 14, 2002; 5RP refers to October 15 and November 22, 2002.

immediate family, B.Z. had several other extended family members who lived nearby and with whom she spent a great deal of time.

B.Z.'s uncle, Mansour Heidari, and his wife lived in the Seattle area near B.Z.'s family, and throughout the years she would visit the Heidari home regularly. 3RP 285-88, 331. B.Z. was very close to the family, and considered Heidari her "favorite uncle." 3RP 288, 308.

When B.Z. was in the fourth grade, the defendant began to sexually abuse her. The first incident that B.Z. testified about happened during this time period. 3RP 332-33. B.Z. testified that she was in Heidari's bedroom playing with her aunt's makeup. 3RP 335. Heidari came up behind B.Z. and touched her on her shoulder and then touched her breasts over her shirt. 3RP 335-39. Heidari then picked B.Z. up and placed her on his lap. 3RP 335, 339. B.Z. testified that she felt a bump under her when she was on Heidari's lap. 3RP 339. This incident formed the basis of Count II and the jury acquitted Heidari of child molestation in the first degree. 5RP 628.

When B.Z. was in the fifth grade, another act of sexual abuse occurred. 3RP 340. B.Z. was alone with Heidari at his house. 3RP 341. B.Z. was playing video games, when Heidari told

her to "come upstairs" so he could "show [her] something." 3RP 340. B.Z. followed Heidari to an upstairs room in which her other uncle was living. 3RP 341. Once in the upstairs room, Heidari showed B.Z. a pornographic movie about a "blond girl in a gym room." 3RP 343-44.

After viewing the video, Heidari said to B.Z., in Persian, "This is what you are supposed to do." 3RP 344-45. Heidari pulled down his pants and underwear, and also disrobed B.Z. 3RP 345. He then anally raped her by inserting his penis in her "behind." 3RP 345-46. B.Z. testified that this was painful, and that after it was over she wiped herself. 3RP 346-48. After this incident, Heidari told her to wear skirts or dresses when she came over. 3RP 348. This incident formed the basis for the charge in Count I, and the jury convicted Heidari as charged of rape of a child in the first degree. 5RP 627.

B.Z. testified about abuse she suffered at Heidari's hands when she was in the sixth grade. B.Z. testified that while at a family gathering at Heidari's home, Heidari was showing children in the family a new BMW. 3RP 349. He took B.Z. for a "test drive," and drove her to a secluded parking lot. 3RP 351. Once in the parking lot, B.Z. testified that Heidari got into the same seat as her, that he

had his penis out, and that he anally raped her while they were in the car. 3RP 352-53. This incident formed the basis for the charge in Count III, and the jury acquitted Heidari of rape of a child in the first degree. See 5RP 628.

B.Z. testified that on another occasion also when she was in the sixth grade, she was again at Heidari's home when he abused her. 3RP 354. B.Z. was in Heidari's bedroom playing with her aunt's makeup when Heidari emerged from the bathroom wearing a robe. 3RP 357-58. Heidari sat down on the edge of the bed and told B.Z. to "come over here," and pulled her leg toward him. 3RP 358. Heidari then pulled his robe away and exposed his penis to her. 3RP 358. B.Z. testified that his penis was erect and described the appearance of a circumcised penis. 3RP 359-60. Heidari put his hand on B.Z.'s head and tried to push her down toward his penis. 3RP 360-61. B.Z. moved her head to the side and ultimately ran out of the bedroom. 3RP 361. This incident served as the basis for the charge in Count IV. The trial court ruled there was insufficient evidence that B.Z. was less than twelve years old at the time of the crime, and thus submitted only an instruction on the lesser included offense of child molestation in the second

degree. Appendix D, at 3. The jury found Heidari guilty of child molestation in the second degree. 5RP 629-30.

B.Z. testified that Heidari did not abuse her during the seventh or eighth grades. 3RP 333. She observed that she was not at his home as much during this time period because there was tension between her own parents and Heidari's family. 3RP 370-72.

When B.Z. was in the ninth grade, her grandmother was visiting the family from Iran. 3RP 362. The grandmother was staying in Heidari's home, and B.Z. and her sister spent the night there with their grandmother. 3RP 362-63. B.Z. was sleeping on the floor in the living room of the house, alone. 3RP 363. Late at night, Heidari came home from working a construction job and woke B.Z. up by shaking her and saying "wake up, wake up." 3RP 364. Heidari had placed his hand on her back and then moved his hand from her back to her breasts. 3RP 365.

B.Z. told Heidari she was sleeping and to leave her alone. She looked up and saw that Heidari had his penis out. 3RP 365. He grabbed B.Z.'s hand and made her touch his penis, and she quickly moved her hand away. 3RP 365. Heidari told her to get up and go to the kitchen, but B.Z. said no, and again told him she was

sleeping. 3RP 365. This incident served as the basis for the charge in Count V and the jury found Heidari guilty as charged of child molestation in the third degree. 5RP 630.

At the time the abuse was happening, B.Z. did not tell anyone about it. However, several months after the last incident, B.Z. decided to tell her cousin about Heidari's abuse. 3RP 366. When visiting this cousin, B.Z. told her that she had been sexually abused by Heidari. 2RP 227-28. B.Z. cried when she told her cousin about the abuse, and asked her not to tell anyone else. 2RP 228-29.

A few months later, B.Z. was again visiting relatives and was watching a movie with her aunt about a woman who had been sexually abused. 2RP 238-40. B.Z. became upset, and later that day, told her aunt about the sexual abuse she had suffered at the hands of Heidari. 2RP 242-43; 3RP 375.

Some time later, the aunt told B.Z.'s mother about the abuse. 2RP 244. B.Z.'s mother confronted B.Z. about the allegations, and B.Z. repeated her disclosure of the abuse to her mother. 2RP 263. B.Z.'s mother helped B.Z. obtain counseling and the police were called, initiating this criminal case. 2RP 264-65.

Heidari did not testify at trial. Through cross examination of State witnesses, and presentation of a few factual witnesses who disputed some of the details described by B.Z. as to Heidari's opportunities to abuse her, Heidari's attorneys argued that B.Z. fabricated these allegations. 3RP 384-428; 4RP 524-33. The defense also presented the testimony of witnesses who claimed that B.Z. was never alone in Heidari's house with Heidari. 4RP 527-30, 552.

A jury convicted Heidari of Counts I and V as charged, convicted him of the lesser degree crime of child molestation in the second degree in Count IV, and acquitted him of Counts II and III. He received a standard range sentence of 162 months of total confinement. He appealed. The Court of Appeals affirmed the convictions. This Court denied review, and mandate issued on December 9, 2005. Heidari filed a previous personal restraint petition, alleging prosecutorial misconduct. That petition was dismissed on April 20, 2007.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

THE COURT OF APPEALS ERRED IN HOLDING THAT IT COULD NOT REMAND FOR ENTRY OF JUDGMENT AS TO THE LESSER OFFENSE UNLESS THE JURY WAS INSTRUCTED ON THE LESSER OFFENSE.

In this case, the Court of Appeals held that it had no power to remand for entry of judgment as to a lesser offense necessarily found to have been committed unless the jury had been instructed as to that lesser offense. In so holding, the Court of Appeals decision conflicts with previous decisions of this Court and other decisions of the Court of Appeals. Review should be granted.

Heidari and the State agree that the evidence was insufficient to support his conviction for Count IV, child molestation in the second degree. This claim is not time-barred because it falls within the exception to the time bar provided by RCW 10.73.100(4) for claims that the evidence was insufficient to support the conviction.

In reviewing a challenge to the sufficiency of the evidence, the appellate court must view the evidence in the light most favorable to the State, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d

628 (1980). A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences must be drawn in favor of the State. State v. Paine, 69 Wn. App. 873, 850 P.2d 1369 (1993).

Child molestation in the second degree is committed when a person has sexual contact with a child who is at least twelve but less then fourteen years old. RCW 9A.44.086. Sexual contact is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire." RCW 9A.44.010(2). Contact is "intimate" if a person of common intelligence would know that the parts touched were intimate. State v. Jackson, 145 Wn. App. 814, 187 P.3d 321 (2008) (concluding that ejaculation constitutes sexual contact).

In the present case, there was no substantial evidence of sexual contact because B.Z. testified that she successfully avoided putting her mouth on Heidari's penis. In regard to Count IV, B.Z. testified that, with his penis erect and exposed, Heidari put his hand on her head and tried to push her face toward his penis. RP 10/9/02 360-61. She moved her head to the side and ultimately ran out of the bedroom. RP 10/9/02 361.

The conduct proven at trial does not establish the completed crime of child molestation in the second degree. The victim was

clear that her mouth did not touch Heidari's penis. There is no indication that any other part of her body touched Heidari's penis. Heidari touched the victim's head in an attempt to force her to perform fellatio, but the head is not an intimate part of the body even under these circumstances. The evidence established the crime of attempted child molestation in the second degree, not the completed crime.

RCW 10.61.003 and 10.61.006 provide that a criminal defendant may be convicted at trial on the charged offense, a lesser degree of the charged offense, an attempt to commit the charged offense, or an offense that is necessarily included within the charged offense. These statutes codify the common law rule that a jury can find the defendant guilty of a lesser offense necessarily included in the offense charged. State v. Berlin, 133 Wn.2d 541, 544-45, 947 P.2d 700 (1997). Properly applied, they satisfy the constitutional notice requirement. State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004). Thus, a defendant charged with a crime receives sufficient notice that he may also be convicted of a lesser degree, an attempt or a lesser included offense. State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979).

The appellate court may "reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and interest of justice may require." RAP 12.2. The Court of Appeals has previously held that when an appellate court reverses a conviction, it may direct the trial court to enter judgment on a lesser offense charged when the lesser offense was necessarily proven at trial. State v. Garcia, 146 Wn. App. 821, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009 (2009). This remedy has been employed when the greater offense is reversed for insufficient evidence. State v. Bucknell, 144 Wn. App. 524, 530, 183 P.3d 1078 (2008).

In Washington, the appellate court's ability to reverse a conviction and remand for entry of judgment on a lesser crime is more than 100 years old. In State v. Watson, 2 Wash. 504, 27 P. 226 (1891), this Court reversed the defendant's conviction for assault with intent to commit murder based on a charging deficiency and remanded for sentencing as to simple assault. Similarly, in State v. Freidrich, 4 Wash. 204, 224, 29 P. 1055 (1892), this Court reversed the defendant's conviction for murder in the first degree based on insufficient evidence of premeditation, and remanded for entry of judgment of murder in the second

degree. In State v. Lillie, 60 Wash. 200, 204, 11 P. 801 (1910), the court reversed the defendant's conviction for assault with a deadly weapon and remanded for entry of judgment of simple assault. This remedy has been applied in numerous appellate cases since. State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970) (second degree assault reversed for insufficiency and remanded for entry of judgment for third degree assault); Garcia, supra, 146 Wn. App. at 829-30 (third degree assault reversed for insufficiency and remanded for entry of judgment for fourth degree assault); Bucknell, supra, 144 Wn. App. at 520 (second degree rape reversed for insufficiency and remanded for entry of judgment for third degree rape); State v. Scherz, 107 Wn. App. 427, 437, 27 P.3d 252 (2001) (first degree robbery reversed for insufficiency and remanded for entry of judgment for second degree robbery); State v. Maganai, 83 Wn. App. 735, 740, 923 P.2d 718 (1996) (attempted first degree rape reversed for insufficiency and remanded for entry of judgment for attempted second degree rape); State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996) (first degree theft reversed based on improper aggregation and remanded for entry of judgment for second degree theft); State v. Robbins, 68 Wn. App. 873, 877, 846 P.2d 585 (1993) (trial court

properly arrested judgment for possession with intent to deliver based on insufficiency and entered judgment for possession); State v. Gilbert, 68 Wn. App. 379, 388, 842 P.2d 1029 (1993) (first degree burglary reversed for insufficiency and remanded for entry of judgment for residential burglary); State v. Cobelli, 56 Wn. App. 921, 925-26, 788 P.2d 1081 (1989) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession); State v. Brown, 50 Wn. App. 873, 878-79, 751 P.2d 331 (1988) (first degree criminal trespass reversed for insufficiency and remanded for entry of judgment for second degree criminal trespass); State v. Kovac, 50 Wn. App. 117, 121, 747 P.2d 484 (1987) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession); State v. Thompson, 35 Wn. App. 766, 772, 669 P.2d 1270 (1983) (first degree escape reversed for insufficiency and remanded for entry of judgment for escape in the second degree); State v. Liles, 11 Wn. App. 166, 173, 521 P.2d 973 (1974) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession).

As recognized by the Court of Appeals in its decision, a number of these cases involved jury trials where no lesser included

offense instruction was given to the jury. See Lillie, 60 Wash. at 204; Freidrich, 5 Wash. at 224-25; Bucknell, 144 Wn. App. at 520; Maganai, 83 Wn. App. at 740; Atterton, 81 Wn. App. at 473-74; Brown, 50 Wn. App. at 878-79; Thompson, 35 Wn. App. at 772. Thus, the Court of Appeals decision in this case explicitly conflicts with those decisions. For this reason, review is warranted pursuant to RAP 13.5A(b) and 13.4(b), which provide that a motion for discretionary review will be granted if the Court of Appeals decision is in conflict with a decision of this Court or another decision of the Court of Appeals.

In the present case, the Court of Appeals relied primarily on State v. Green, 94 Wn.2d at 234, in reaching its decision. In Green, this Court stated that "in general, a remand for simple resentencing on a 'lesser included offense' is only permissible when the jury has been explicitly instructed thereon." Id. However, as noted in Gilbert, that statement was dictum unsupported by any citation to authority. Gilbert, 68 Wn. App. at 384-85. In Green, this Court found insufficient evidence of kidnapping, which was part of the basis for Green's conviction for aggravated murder. Green, 94 Wn.2d at 218. Because the evidence was sufficient to prove the alternative means of rape, and because there was no unanimity

instruction, this Court remanded for a new trial on aggravated murder based on rape. Id. This Court rejected the State's suggestion that the matter simply be remanded for entry of judgment on the lesser included offense of murder in the first degree, because "we cannot say the jury found all the elements of the lesser included offense of first degree murder which is dependent upon proof of the crime of rape." Id. at 235. Remand for entry of judgment as to murder in the first degree was unavailable not because the jury had not been instructed on that offense, but because there was no way to know whether the jury had unanimously found Green guilty of that offense.

The limitation suggested in the dicta in Green--that remand for entry of judgment on a lesser offense may only occur if the jury was instructed as to the lesser offense--is not supported by authority and is not logical, and should be disavowed by this Court. Pursuant to the Washington Pattern Jury Instructions, when a lesser degree or lesser included or attempt is submitted to the jury as an alternative, the jury is instructed to consider the greater crime first and fill in the verdict if they unanimously agree that the defendant is guilty. WPIC 155.00. If the jury reaches unanimous agreement that the defendant is guilty of the greater crime, the

lesser crime is never considered. The lesser crime is only considered if the jury acquits the defendant of the greater crime or cannot reach a unanimous verdict. Thus, the fact that a lesser crime instruction was given is meaningless when the jury has reached a verdict on the greater crime. There is no reason to think that the jury ever considered the lesser crime in its deliberations.

Moreover, the limitation suggested in Green is inequitable because it does not apply to convictions obtained through bench trials or in cases where the defense properly requested the lesser instruction.

Other jurisdictions have approved of appellate courts remanding for entry of judgment on a lesser offense necessarily proved at trial, regardless of whether the jury was instructed on the lesser offense. U.S. v. Hunt, 129 F.3d 739, 744-46 (5th Cir. 1997); U.S. v. Lamartina, 584 F.2d 764, 766-67 (6th Cir. 1978); U.S. v. Cobb, 558 F.2d 486, 489 (8th Cir. 1977); U.S. v. Melton, 491 F.2d 45, 57-58 (D.C. Cir. 1973); People v. Patterson, 532 P.2d 342, 345 (Colo. 1975); State v. Line, 214 P.3d 613, 629-30 (Hawaii 2009); State v. Shields, 722 So.2d 584, 587 (Miss. 1998); In re York, 756 N.E.2d 191, 197-99 (Ohio. App. 2001).

In sum, Washington courts have long held that remand for entry of judgment on a lesser offense where it is clear that the trier of fact found the elements of that crime is an appropriate remedy, regardless of whether the jury was instructed as to the lesser offense. Because an attempt is the functional equivalent of a lesser degree pursuant to RCW 10.61.003, the appellate court may also remand for entry of judgment for an attempt to commit the charged crime where it is clear the trier of fact found sufficient evidence to support that crime. An attempt is committed when the defendant takes a substantial step toward commission of the crime with the intent to commit the crime. RCW 9A.28.020(1). By finding Heidari guilty of the completed crime, the jury necessarily found that Heidari acted with the intent to commit the crime and took a substantial step toward its commission when he grabbed B.Z.'s head and tried to force it toward his erect and exposed penis.

Because the evidence is insufficient to support Heidari's conviction for child molestation in the second degree, but sufficient to support conviction for attempted child molestation in the second degree, the Court of Appeals should have remanded for entry of judgment for attempted child molestation in the second degree as

to Count IV. This Court should accept review of the Court of Appeals' holding that it had no power to do so.

F. CONCLUSION.

This Court should accept review for the reasons indicated in Part E. This Court should grant Heidari's personal restraint petition but remand for entry of judgment on attempted child molestation in the second degree.

DATED this 22nd day of February, 2011.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint Petition of MANSOUR HEIDARI, Petitioner.	No. 63040-7-I DIVISION ONE PUBLISHED OPINION FILED: January 24, 2011

APPELWICK, J. — Heidari was convicted of one count of rape of a child in the first degree, one count of child molestation in the second degree, and one count of child molestation in the third degree. In response to Heidari's personal restraint petition, the State concedes that the evidence was insufficient as a matter of law to support his conviction on child molestation in the second degree. But, the State requests that this court remand for entry of judgment on the lesser included offense of attempted child molestation. The State also concedes a sentencing error on count I and requests resentencing. We hold that a remand for resentencing on the lesser included crime of attempt is precluded where the jury was not instructed on that crime. We grant the petition, reverse the conviction for second degree child molestation, accept the State's concession of error on count I, and remand for resentencing.

FACTS

The facts of this case were set forth in this court's previous opinion resulting from Mansour Heidari's direct appeal. State v. Heidari, noted at 125 Wn. App. 1009, 2005 WL 91696, at *1-*2. For the purposes of this personal restraint petition (PRP), only the facts relating to count IV are relevant.

B.Z. testified that when she was in sixth grade, she was in her uncle Heidari's bedroom playing with her aunt's makeup when Heidari emerged from the bathroom wearing a robe. Heidari sat down at the edge of the bed and told B.Z. to come over, pulling her leg toward him. Heidari then pulled his robe away and exposed his penis to her. Heidari put his hand on B.Z.'s head and tried to push her down toward his penis. B.Z. moved her head to the side and eventually ran out of the room. B.Z. testified that her mouth did not touch his penis. No other evidence of sexual contact was put forth by the State.

Among other charges, the State charged Heidari with child molestation in the first degree as count IV. Only the lesser included offense of child molestation in the second degree was submitted to the jury as count IV.[1] The jury found Heidari guilty. Heidari was also convicted of one count of rape of a child in the

[1] This court's previous opinion explained that:

> Observing that RCW 9A.44.083, child molestation in the first degree, requires that the victim be less than twelve years old, the trial court ruled that as a matter of law there was insufficient evidence for the jury to find that B.Z. was less than twelve years old at the time of the offense. The trial court therefore submitted to the jury only an instruction on the lesser offense of child molestation in the second degree.

Heidari, 2005 WL 91696, at *1.

first degree and one count of child molestation in the third degree. This court affirmed the convictions. Heidari, 2005 WL 91696, at *1. The Supreme Court denied review. State v. Heidari, 155 Wn.2d 1008, 122 P.3d 912 (2005). The case was mandated on December 9, 2005. Certiorari and habeas corpus were also denied. Heidari v. Washington, 547 U.S. 1075, 126 S. Ct. 1779, 164 L. Ed. 2d 525 (2006); Heidari v. Pacholke, 2008 WL 2435891 (W.D. Wash. June 13, 2008) (unpublished opinion). Finally, Heidari's previous PRP was denied.

Heidari then filed a motion for relief from judgment under CrR 7.8. After receiving Heidari's motion, the superior court transferred it to this court pursuant to CrR 7.8(c)(2) for treatment as a PRP.

DISCUSSION

I. Standard of Review

An appellate court will grant substantive review of a PRP only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error which constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Pers. Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

II. Grant of Petition

The State concedes that Heidari properly brought this PRP even though it was filed more than one year after entry of the judgment and sentence in violation of RCW 10.73.090, as the PRP is based on grounds that the evidence introduced at trial was insufficient to support the conviction. RCW 10.73.100(4). Heidari's petition is not time barred.

The State concedes that the second degree child molestation charge in count IV is not supported by sufficient evidence because no evidence proves that sexual contact occurred. The State also concedes that the judgment and sentence reflected an incorrect seriousness level for count I. The parties agree that the correct seriousness level was XI.

We agree and grant the petition.

III. Remedy

The agreed remedy for the mistaken seriousness level for count I is resentencing. We remand for resentencing as to count I with the corrected seriousness level of XI.

The parties dispute the remedy with respect to count IV. The State argues that because the evidence established the crime of attempted child molestation in the second degree, this court should remand for entry of judgment as to that crime. Generally, an appellate court "may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." RAP 12.2; State v. Gilbert, 68 Wn. App. 379, 384, 842 P.2d 1029 (1993). Heidari contends that, based on due process and double jeopardy protections, this court must reverse his conviction and dismiss rather than impose a conviction for attempted child molestation. We review alleged due process and double jeopardy violations de novo. State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). However, we need not reach Heidari's argument that the remand for resentencing on the lesser included remedy would also violate

protections against double jeopardy. Heidari prevails on this issue, because the outcome is controlled by State v. Green, 94 Wn.2d 216, 234, 616 P.2d 628 (1980).

RCW 9A.44.086 defines child molestation in the second degree as, "[W]hen the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." A person is guilty of attempt if "with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020. Attempted child molestation in the second degree is a lesser offense included in the crime of child molestation in the second degree, because all elements of the lesser offense are necessary elements of the greater crime. See State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) ("To establish that an offense is a lesser included offense, the rule is: first, each of the elements of the lesser offense must be a necessary element of the offense charged; second, the evidence in the case must support an inference that the lesser crime was committed." (Emphasis omitted.)); State v. Mannering, 150 Wn.2d 277, 284, 75 P.3d 961 (2003) ("[A]n attempt to commit a crime is included in the crime itself."). Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense. RCW 10.61.003.

Our Supreme Court has indicated that the remedy of remand for resentencing on a lesser included offense generally is permissible only when the jury has been explicitly instructed on it. Green, 94 Wn.2d at 234. In that case, Green was convicted of aggravated murder for killing his eight year old victim in the course of either kidnapping or raping her. State v. Green, 91 Wn.2d 431, 433-35, 588 P.2d 1370 (1979), superseded in part on recons. by Green, 94 Wn.2d at 216. On reconsideration, our Supreme Court reversed the aggravated murder conviction due to insufficiency of the evidence of kidnapping and verdict form errors and remanded for a new trial on the charge of aggravated murder in the first degree based on first degree rape or attempted rape. Green, 94 Wn.2d at 233. The State sought the imposition of the lesser included offense of first degree murder. Id. at 234. The court refused, stating:

> In the case at hand the jury was not instructed on the subject of a "lesser included offense". In general, a remand for simple resentencing on a "lesser included offense" is only permissible when the jury has been explicitly instructed thereon. *Based upon the giving of such an instruction* it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense.

Id. (alteration in original). The court additionally clarified that, "[i]n addition, it is clear a case may be remanded for resentencing on a 'lesser included offense' only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense." Id. at 234-35.

Subsequent Court of Appeals cases have characterized this statement in Green as dictum. For example, in Gilbert, the trial court convicted Gilbert of first degree burglary after a bench trial. 68 Wn. App. at 381. This court reversed

Gilbert's first degree burglary conviction for insufficient evidence and remanded for entry of judgment and sentence for residential burglary. Id. at 388. In doing so, we discussed the language in Green, calling it "dictum" and "unsupported by any citation to authority." Id. at 384-85. We stated that our research had not "revealed any authority which supports that proposition." Id. at 385. Instead, we concluded, "[T]he dispositive issue should *not* be whether the jury was instructed on the lesser included offense, but rather whether the jury necessarily found each element of the lesser included offense in reaching its verdict on the crime charged." Id. Relying on Gilbert, we subsequently affirmed that reasoning in a case tried to a jury. State v. Gamble, 118 Wn. App. 332, 336, 72 P.3d 1139 (2003) (one count of second degree felony murder, vacated due to In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), reduced to one count of first degree manslaughter), rev'd in part on other grounds, 154 Wn.2d 457, 469-70, 114 P.3d 646 (2005) (holding manslaughter was not a lesser included offense of second degree felony murder where assault was the predicate felony).

The question in this case is whether the articulation of the rule announced by the Supreme Court in Green or the interpretation by the Court of Appeals in the Gilbert/Gamble line of cases controls.

It is not in dispute that if a jury is properly instructed on a lesser included offense, an appellate court may remand to the trial court for imposition of judgment on a lesser included crime where the jury necessarily found the elements of the lesser offense. Several Washington cases have done so. See, e.g., State v. Watson, 2 Wash. 504, 507, 27 P. 226 (1891) (assault with intent to

commit murder reduced to simple assault); State v. Scherz, 107 Wn. App. 427, 437, 27 P.3d 252 (2001) (first degree robbery reduced to second degree robbery where the jury was instructed on both crimes); State v. Jones, 22 Wn. App. 447, 454, 591 P.2d 796 (1979) (possessing stolen property in the second degree reduced to possessing stolen property in the third degree where the jury was instructed on both crimes); State v. Liles, 11 Wn. App. 166, 173, 521 P.2d 973 (1974) (unlawful possession with intent to distribute reduced to possession where jury was instructed on both crimes). The U.S. Supreme Court has also approved this procedure, upholding the reduction of an aggravated murder conviction to a murder conviction where the jury was instructed on the lesser included offense. Morris v. Mathews, 475 U.S. 237, 242, 246-47, 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986). Our appellate court also approved a trial court's entry of judgment on the lesser included offense of possession after finding the evidence insufficient to support the greater charge of possession with the intent to deliver where the jury was instructed on the lesser included offense. State v. Robbins, 68 Wn. App. 873, 875, 877, 846 P.2d 585 (1993).

Despite this court's contrary holdings in Gilbert and Gamble, we are persuaded that the statement by the Supreme Court in Green is correct and controlling: remand for resentencing on a lesser included offense is only permissible where the jury is explicitly instructed on the lesser included offense. For the jury to make a finding on a lesser included offense, the jury must have received an instruction as to that offense. State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993) ("To find an accused guilty of a lesser included offense,

the jury must, of course, be instructed on its elements."). Even though, in this case, the jury found the facts sufficient to support the crime of attempted child molestation, the jury could not have convicted Heidari of that crime where it never received an instruction on that crime. Similarly, the trial court could not have vacated the conviction and entered judgment on the lesser included offense of attempted child molestation in the second degree. See State v. Symes, 17 Wash. 596, 599, 50 P. 487 (1897) (holding that the trial court does not have the authority under 2 Hill's Code Procedure § 1319, now RCW 10.61.003, to enter a verdict on a lesser degree where the jury's verdict was unsupported by the evidence). Following Gilbert and Gamble would require that we order the trial court on remand to do what neither the jury nor the trial court had authority to do at trial. The appellate court simply lacks such authority, a fact neither Gilbert nor Gamble overcome in criticizing Green.[2]

We do not quarrel with the result in Gilbert. In that case, the defendant's case was tried to the bench. Gilbert, 68 Wn. App. at 381. In a bench trial, no jury instructions are required. See State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978) ("The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict, so far as it is

[2] We have not been asked to address whether he may be retried on the crime of attempt. But, we note that a reversal for insufficient evidence generally terminates jeopardy and prevents subsequent retrial. See State v. Linton, 156 Wn.2d 777, 784, 132 P.3d 127 (2006) ("Acquittal of an offense terminates jeopardy."); State v. Wright, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009) ("A reversal for insufficient evidence is deemed equivalent to an acquittal, for double jeopardy purposes, because it means 'no rational factfinder could have voted to convict' on the evidence presented." (quoting Tibbs v. Florida, 457 U.S. 31, 40-41, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982)).

competent for the court to assist them."). The trial court judge, as the trier of fact, is not constrained by the instructions and may consider the charged offense as well as any lesser included offense. See State v. Peterson, 133 Wn.2d 885, 892-93, 948 P.2d 381 (1997) (In a bench trial, the judge "may properly find defendant guilty of any inferior degree crime of the crimes included within the original information."). This is because RCW 10.61.003[3] and RCW 10.61.006[4] notify a defendant charged with a crime that he may also be tried on a lesser degree or a lesser included offense. RCW 10.61.010;[5] State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979); Peterson, 133 Wn.2d at 889, 892-93 (RCW 10.16.003 and 10.61.006 provide the required notice and apply to a trial court sitting as a finder of fact as well as to a jury.).

Indeed, Washington cases have approved of entry of judgment on remand after a bench trial. See State v. Miles, 77 Wn.2d 593, 604, 464 P.2d 723 (1970) (on review of bench trial, assault in the second degree reduced to assault in the third degree); State v. Garcia, 146 Wn. App. 821, 829-30, 193 P.3d 181 (2008) (on review of bench trial, one count of third degree assault reduced to one count

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[3] RCW 10.61.003 states, "Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense."

[4] RCW 10.61.006 states, "In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information."

[5] RCW 10.61.010 states in part, "Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime."

of fourth degree assault), review denied 166 Wn.2d 1009, 208 P.3d 1125 (2009); State v. Atterton, 81 Wn. App. 470, 471, 915 P.2d 535 (1996) (on review of bench trial, one count of first degree theft reduced to one count of second degree theft because of insufficient evidence); State v. Cobelli, 56 Wn. App. 921, 925-26, 788 P.2d 1081 (1989) (on review of bench trial, possession with intent to deliver reduced to possession because of insufficient evidence).

Because the Gilbert court was reviewing a bench trial, it had no reason to address or determine whether a jury could have entered a verdict on a lesser included offense absent an instruction. All the court had to decide in that case was whether the trial court necessarily found all the elements of a lesser included crime of the charged crime and therefore could have entered judgment for the lesser included offense. We agree that the trial court could have done so. Green did not require a different result. Therefore, the remand for entry of judgment on the lesser included offense against Gilbert was not at odds with Green. It was dicta for the Gilbert court to opine as to whether Green would have been the appropriate rule had Gilbert been tried to a jury rather than the bench.

Additionally, the Gilbert opinion relies on "logic" and on a number of cases with little or no explanation. 68 Wn. App. at 385-86. But, the Washington cases cited by Gilbert do not support its conclusion with regard to jury trials. In the earliest case cited by Gilbert, State v. Freidrich, 4 Wash. 204, 224-25, 29 P. 1055 (1892), our Supreme Court set aside the jury's conviction of murder in the first degree and remanded with instructions to enter judgment on murder in the second degree. Gilbert, 68 Wn. App. at 387. In doing so, the court did not

explicitly indicate whether the jury was instructed on the lesser degree offense. Freidrich, 4 Wash. at 224-25. However, the court stated, "The distinction made between murder of the first and second degrees is a fine one, and it is not to be wondered at that juries sometimes fail to appreciate it; but the law makes it, and the law is master of us all." Id. at 224. The implication is that the jury was confronted with a choice between the two crimes, which indicates that the jury was instructed on both. If true, it is consistent with Green. No rationale was stated for its decision to remand the case with instructions. Freidrich, 4 Wash. at 224-25.[6]

Gilbert also relies on State v. Lillie, 60 Wash. 200, 110 P. 801 (1910). Gilbert, 68 Wn. App. at 387. In Lillie, the defendant was convicted by a jury of assault with a deadly weapon with intent to inflict bodily injury. 60 Wash. at 200. Our Supreme Court determined that the evidence was insufficient to find that the defendant hit the victim with a hammer, but there was no doubt he hit the victim with his fist. Id. at 203. The court remanded for entry of judgment and sentence for assault. Id. at 204. But, Lillie predated Green.

[6] Freidrich brought a habeas petition in the federal court arguing that the superior court's subsequent entry of judgment of murder in the second degree was void. In re Freidrich, 51 F. 747, 748-49 (C.C.D. Wash. 1892). The federal court agreed with Freidrich that the remand was improper but refused to grant habeas relief because Freidrich had a remedy in the state courts. Id. at 748-751. The U.S. Supreme Court affirmed. Ex parte Frederich, 149 U.S. 70, 13 S. Ct. 793, 37 L. Ed. 653 (1893).

Gilbert also relied on State v. Plakke, 31 Wn. App. 262, 267, 639 P.2d 796 (1982), overruled on other grounds by State v. Davis, 35 Wn. App. 506, 510, 667 P.2d 1117 (1983). 68 Wn. App. at 385. In Plakke, the defendant was convicted by a jury as an accomplice to the crime of first degree robbery. 31 Wn. App. at 263. The court held that accomplice liability to first degree robbery required proof beyond a reasonable doubt that the alleged accomplice was aware of the principal's possession of a deadly weapon during the commission of the crime and remanded for entry of a conviction of second degree robbery. Id. The court stated, "Though we would ordinarily accede to the defendant's request for a new trial, under the unique fact pattern presented," namely that by returning a verdict of first degree robbery the jury found that the defendant performed those acts which would support a determination of guilt on second degree robbery, "we believe the more appropriate remedy requires resentence for the crime of second degree robbery." Id. at 267. But, the court provided no analysis and no citation to authority, apparently ignoring Green, which was decided two years earlier. Id.

Similarly, in State v. Ellard, the court reversed the jury verdict and remanded for sentencing on the lesser included offense without explanation. 46 Wn. App. 242, 247, 730 P.2d 109 (1986). The court simply stated, "Therefore, the conviction on count 3 must be reduced to third degree theft." Id. This case also did not discuss Green.

Gilbert cited to State v. Brown, 50 Wn. App. 873, 875, 878-879, 751 P.2d 331 (1988), a case that reversed the jury verdict of first degree criminal trespass and directed the trial court to enter a conviction for second degree criminal trespass instead. Gilbert, 68 Wn. App. at 385. Brown disagreed with Green, stating, "We find no logical reason, when each element of the lesser included offense has been found, that the trial court's failure to instruct on the lesser included offense should prevent this court from directing the trial court to enter such a conviction." 50 Wn. App. at 878. To support this proposition, Brown simply relied on Plakke. Brown, 50 Wn. App. at 878. As we have stated, Plakke did not analyze Green or the issue.

Gilbert also relied on out of state authority. But, Ritchie v. State was tried to the bench. 243 Ind. 614, 616, 189 N.E.2d 575 (1963). In Austin v. United States, the jury was instructed on the lesser included offense. 382 F.2d 129, 137 n.18, 142 (D.C. Cir. 1967), overruled on other grounds by United States v. Foster, 783 F.2d 1082, 1085 (D.C. Cir. 1986) (en banc). The remaining cases on which Gilbert relies, Wills and Daniels, provide no analysis of the issue. Wills v. State, 193 Ark. 182, 98 S.W.2d 72, 74 (1936); Daniels v. State, 196 Miss. 328, 17 So. 2d 793, 794 (1944).

The pronouncement in Green relating to instructions is clear and limited to cases tried to the jury. 94 Wn.2d at 234. Only the second requirement articulated by Green, the requirement that the record discloses that the trier of fact expressly found each of the elements of the lesser offense, applies more broadly to both trials to the bench and to the jury. Id. at 234-35. And, it is

necessary to distinguish between the trial to a jury, which is constrained to render a verdict consistent with the instructions given, from the trial to the bench, which may convict on any crime charged or any lesser included without the limitation of instructions. The "logic" on which Gilbert relies overlooked this distinction.

Gamble, as distinct from Gilbert, was tried to a jury. 118 Wn. App. at 334. Yet, the persuasiveness of the reasoning of that case is limited as it relies entirely on Gilbert. Id. at 336. As previously explained, Gilbert did not, and could not, thoroughly determine whether the rule in Green would be correctly applied in the context of a bench trial. We find Gamble's reliance on Gilbert misplaced.

We recognize that in numerous other cases our courts have remanded for resentencing on a lesser included crime without the jury having been instructed on the lesser included crime.[7] These cases likewise do not compel us to reject

[7] See State v. Freidrich, 4 Wash. 204, 224-25, 29 P. 1055 (1892) (first degree murder reduced to second degree murder because of insufficient evidence); State v. Bucknell, 144 Wn. App. 524, 531, 183 P.3d 1078 (2008) (one count of second degree rape reduced to one count of third degree rape because of insufficient evidence, no information on whether jury was instructed on lesser charge); Gamble, 118 Wn. App. at 336 (one count of second degree felony murder reduced to one count of first degree manslaughter); State v. Maganai, 83 Wn. App. 735, 740, 923 P.2d 718 (1996) (attempted rape in the first degree reduced to attempted rape in the second degree because of insufficient evidence, no information on whether jury was instructed on lesser charge); Brown, 50 Wn. App. at 878-79 (criminal trespass in the first degree reduced to second degree criminal trespass, no instruction given on lesser included offense); State v. Thompson, 35 Wn. App. 766, 772, 669 P.2d 1270 (1983) (escape in the first degree reduced to escape in the second degree); State v. Papadopoulos, 34 Wn. App. 397, 405, 662 P.2d 59 (1983) (first degree robbery reduced to second degree robbery) overruled on other grounds by State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984); Plakke, 31 Wn. App. at 267-68 (first degree robbery reduced to second degree robbery); State v. Martell, 22 Wn. App. 415, 416, 419, 591 P.2d 789 (1979) (burglary in the second degree reduced to criminal trespass in the second degree despite the trial court refusing to instruct

Green. State v. Bucknell is especially worthy of review. 144 Wn. App. 524, 183 P.3d 1078 (2008). Bucknell received a jury trial. Id. at 526. The Court of Appeals held that the evidence was insufficient to convict Bucknell of second degree rape but remanded for entry of judgment on the lesser charge of third degree rape. Id. at 530-31. The court relied on Atterton for the proposition that when evidence is sufficient to support conviction of a lesser crime, this court may remand the case for entry of judgment and sentence on the lesser crime. Bucknell, 144 Wn. App. at 530. Atterton involved a bench trial. 81 Wn. App. at 471. But, the court did not analyze or provide reasoning for whether the rule in Atterton should be applied to review of a jury trial. Id. Thus, Bucknell is also not persuasive here. Also, State v. Maganai cites no authority and provides no rationale for the decision to remand for entry of judgment on the lesser offense. 83 Wn. App. 735, 740, 923 P.2d 718 (1996). But, the holding is unremarkable since it followed on the heels of Gilbert. No Washington case presents a reasoned analysis in support of the proposition that, in a case tried to a jury, the decision in Green should not be followed.

Since a jury cannot render a verdict on a crime for which it was not instructed, Green controls where the case is tried to a jury that has not been instructed on the lesser included offense. The Gilbert rule applies only to bench trials.[8] Here, we follow Green and hold that an appellate court may not remand

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the jury on criminal trespass in the second degree, but the jury was otherwise instructed on the elements of the crime).

[8] Similarly, in a juvenile context, there is no jury. RCW 13.04.021(2). We would expect that the appropriate rule to apply in that case would be the rule in Gilbert rather than in Green. See, e.g., State v. Kovac, 50 Wn. App. 117, 121, 747 P.2d

for resentencing on a lesser included charge in a jury trial case unless the jury was instructed on that charge.

The State makes several policy arguments as to why such an outcome would be inequitable. The State argues that defendants receiving jury trials would receive different treatment than those receiving bench trials or trials in juvenile court. Also, a defendant who properly requested a lesser included instruction and who successfully overturns a conviction on the completed crime would be subject to a remand for resentencing, but the less diligent defendant would not. But, these differences inhere in the structure of trial choices the defendant can make. The defendant can ask for a jury or not. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). And, because a lesser included instruction may be requested by either the prosecution or the defense, no unfairness exists. See Berlin, 133 Wn.2d at 548. A defendant can request an instruction on a lesser included offense or gamble that he will be acquitted on the greater charge. See, e.g., State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). A prosecutor can choose an all or nothing approach or provide the jury with alternatives. Such tactical choices are not inherently unfair and we need not "rescue[ ] the State from a failed strategy." See Garcia, 146 Wn. App. at 834 (Schulteis, C.J., dissenting).

Absent an instruction on the lesser included crime, the jury cannot find him guilty of that crime. Harris, 121 Wn.2d at 320. The State asks us to do on

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484 (1987) (in juvenile case, possession with intent to deliver reduced to simple possession).

appeal what the neither the jury nor the trial court was authorized to do at trial. We lack such authority.

We reverse the conviction for second degree child molestation under count IV and remand for resentencing.[9]

WE CONCUR:

[9] Heidari also requested costs and submitted a cost bill. We remind him that his cost bill should be resubmitted after this opinion is filed consistent with RAP 14.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, PLLC., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Motion for Discretionary Review, in In re Personal Restraint of Heidari, Cause No. 63040-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

02/22/11
Date